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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

PETER E. LIPPETT et al., as Successor Trustees, etc.,	
Plaintiffs and Respondents,	**A115453**
v.	
FRANK E. LEMBI et al.,	**(San Mateo County Super. Ct. No. CIV 437241)**
Defendants and Appellants.	
FRANK LEMBI et al.,	
Plaintiffs and Appellants,	**A116342 A117583**
v.	
PETER E. LIPPETT et al., as Successor trustees, etc.,	**(San Mateo County Super. Ct. No. CIV 448602)**
Defendants and Respondents	

The dispute underlying these appeals arose almost 10 years ago. In 1998, the Brandstetter Family Trust, of which Marie Z. Brandstetter (Brandstetter) was then trustee, leased premises in San Mateo County to appellants Frank E. Lembi (Lembi) and John Kockos (Kockos). In 1999, Brandstetter sued appellants for breach of the lease, initiating the first of three actions between the parties. In the first of these actions, the superior court ultimately declared the lease terminated. A second action brought by Brandstetter was resolved by a settlement agreement that, among other things, restored Brandstetter to

possession of the premises. Lembi and Kockos then filed the third action, seeking reinstatement of the lease and tort damages from Brandstetter. Brandstetter prevailed on summary judgment in this final action and was awarded attorney fees.

Lembi and Kockos now challenge three unfavorable rulings by the superior court. They assert that the superior court erred in granting Brandstetter's motion under Code of Civil Procedure section 664.6 to enforce the settlement agreement in the second of the three actions; the superior court erred in granting summary judgment against them in their action against Brandstetter; and, the superior court's award of attorney fees to Brandstetter was both legally improper and excessive in amount. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The procedural history of the three different actions between the parties is somewhat complex, and we set forth the facts relating to each separately. Because the actions overlapped in time, our factual recitation does not always follow a strict chronological order.

The First Action

On February 26, 1998, Brandstetter leased to Lembi and Kockos a commercial building on El Camino Real in Millbrae. The written lease provided for an initial term of 10 years, with two additional option periods totaling 25 years.

On November 23, 1999, Brandstetter filed the first action against Lembi and Kockos alleging a number of causes of action and seeking money damages and cancellation of the lease. (*Brandstetter v. Lembi* (Super. Ct. San Mateo County, 2003, No. CIV 411164 (the First Action).) It was tried without a jury before Judge Joseph E. Bergeron, and on February 27, 2003, Judge Bergeron entered an interlocutory order stating: "[¶] 1. The lease is terminated. [¶] 2. Rents due and owing from the date of the last hearing through the date of this hearing shall be due and payable three days from the notice of order. The balance of the unpaid rent is due and owing to [Brandstetter]. [¶] 3. The [c]ourt denies awarding any damages to [Brandstetter]. [¶] 4. Either party may bring an appropriate motion to be determined prevailing party and for an award of attorneys fees."

Judge Bergeron entered a judgment in the First Action on June 10, 2003. The judgment denied Brandstetter any recovery in damages, terminated the lease, and awarded Brandstetter $80,000 in attorney fees. On October 16, 2003, Judge Bergeron filed an order explaining the basis for his attorney fee award and ordering Lembi and Kockos to pay $13,258.38 in back rent for a specified period in late 2002. The October 16, 2003 order also stated, "The [c]ourt will defer ruling at this time upon the issue of other back rent due and payable in accordance with [p]aragraph 2 of its [o]rder dated 27 February 2003."

Lembi and Kockos appealed the judgment in the First Action to this court, and on December 27, 2004, we issued an unpublished opinion affirming the judgment. (*Brandstetter v. Lembi* (A103393, A104289).) After the California Supreme Court denied appellants' petition for review, our remittitur issued on March 24, 2005, making our decision final for all purposes.

The Second Action

On February 5, 2004, Brandstetter filed her second action against Lembi and Kockos. (*Brandstetter v. Lembi* (Super. Ct. San Mateo County, 2005, No. CIV 437241 (the Second Action).) The Second Action sought a declaratory judgment restoring Brandstetter to possession of the property on El Camino Real and an award of back rent through February 28, 2003, as well as either rent or the reasonable value of the use and occupancy of the property from March 1, 2003, through the date of the judgment in the Second Action. Brandstetter filed a second amended complaint in the Second Action on March 7, 2005. In addition to the relief requested in the initial complaint, the second amended complaint asserted that Lembi and Kockos had committed waste and asked for an award of general damages on that basis.

On May 2, 2005, the parties and their counsel appeared before Judge Steven L. Dylina, and they agreed that Judge Dylina would resolve two legal issues: (1) the legal effect of Judge Bergeron's judgment in the First Action and (2) the type of legal relationship, if any, that then existed between Brandstetter and appellants. Two days later, Judge Dylina ruled that Judge Bergeron's prior judgment did not preclude

Brandstetter from seeking to prove that Lembi and Kockos owed back rent. Judge Dylina also concluded that after Judge Bergeron's judgment in the First Action terminated the lease, the relationship between Brandstetter and Lembi and Kockos became a tenancy at sufferance. At a further hearing on May 5, 2005, Judge Dylina referred the parties to Judge Barbara J. Mallach for settlement negotiations.

Judge Mallach conducted settlement negotiations on May 5 and 6, 2005. In connection with the settlement negotiations, Brandstetter provided Judge Mallach and counsel for Lembi and Kockos with a chart reflecting a total back rent claim of more than $337,000. On May 6, counsel informed her they had reached a settlement, the terms of which Brandstetter's counsel, Herbert Yanowitz (Yanowitz), read into the record. As relevant here, the settlement provided that: (1) Brandstetter would be restored to immediate possession of the premises, with Lembi and Kockos having 30 days to remove their property; (2) Lembi and Kockos would pay Brandstetter $170,000 within 90 days; (3) Lembi and Kockos could satisfy the $80,000 award for attorney fees, together with interest and additional attorney fees, by paying $3,000 on the first of every month commencing June 1, 2005; and (4) upon receipt of the $170,000, Brandstetter would dismiss the Second Action with prejudice. The settlement agreement further provided that so long as Lembi and Kockos were not in default in their monthly payments, Brandstetter would not enforce the judgment in the First Action. Finally, Yanowitz noted on the record that "[t]his agreement is intended for settlement under the terms of the Code of Civil Procedure under [s]ection [664.6], and we're expressly requesting that the court retain jurisdiction to enforce the settlement until performance in full of the terms of this only."

Shortly after the parties reached settlement, Kockos provided Brandstetter's property manager, Kevin Cullinane (Cullinane), with a key to the premises. By June 2005, Lembi and Kockos had removed all of their property from the El Camino Real location and had vacated the premises. On August 12, 2005, Lembi and Kockos paid Brandstetter the $170,000 due under the settlement agreement. On August 16, 2005,

Yanowitz signed a request for dismissal of the Second Action, and it was filed on August 18.

The Third Action

Meanwhile, on August 2, 2005, Lembi and Kockos filed an action against Brandstetter, Cullinane, and SC Properties, Cullinane's management company. (*Lembi v. Brandstetter* (Super. Ct. San Mateo County, 2006, No. CIV 448602 (the Third Action).) Although they filed the Third Action on August 2, Lembi and Kockos did not serve the summons and complaint until *after* Brandstetter had filed the request for dismissal in the Second Action. In their complaint, Lembi and Kockos alleged five causes of action, four of which sounded in tort. The complaint's first cause of action sought declaratory relief and requested "relief from the forfeiture of the lease dated February 26, 1998 and [to] have the lease fully reinstated and remain in full force and effect." The second cause of action alleged abuse of process and claimed that Cullinane, acting on Brandstetter's behalf, had wrongfully recorded the judgment in the First Action and made a demand in escrow on third parties for "monies exceeding any amounts reflected in the judgment." The third, fourth, and fifth causes of action were brought by Kockos alone and alleged various tort claims arising out of Cullinane's recording of the judgment in the First Action and his demand for payment from third parties.[1]

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[1] We will summarize briefly the facts underlying Kockos's individual causes of action. Kockos owned a one-half interest in a parcel of real property located on Brandt Road in Hillsborough and had entered into an agreement to sell it. In connection with the proposed sale, escrow was opened at North American Title Company (North American). On or about September 23, 2003, Cullinane wrote to the title company's escrow officer, sending her a copy of the judgment in the First Action and requesting payment of $237,092.79, a sum that represented the $80,000 attorney fee award and $157,092.79 in back rent. Three days later, Cullinane recorded the judgment in the First Action. On or about October 9, 2003, Cullinane again communicated with the escrow officer, reducing his request for payment to $93,258.38 and noting that Judge Bergeron would deal with the balance of the rent claim after this court decided the appeal in the First Action. In a declaration filed below, Cullinane stated that, in his communications with the escrow officer, he sought to collect the attorney fee award entered by Judge Bergeron and to recover back rent that included sums that had been part of the motion as to which Judge Bergeron had reserved judgment and which later were sought in the Second Action.

During a case management conference in the Third Action on December 13, 2005, Judge Gerald J. Buchwald made an oral order staying the proceeding and directing Brandstetter[2] to file a motion before Judge Mallach to determine whether any portion of the Third Action was within the scope of the parties' settlement agreement in the Second Action.[3] In May 2006, Brandstetter duly filed a motion citing Code of Civil Procedure section 664.6 and asserting that Lembi and Kockos's claim for relief from forfeiture in the Third Action violated the settlement agreement in the Second Action. The motion was filed in the Second Action and submitted to Judge Mallach for determination. After a hearing, on July 5, 2006, Judge Mallach filed an order granting Brandstetter's motion. Lembi and Kockos filed a timely appeal from this order, which is before us as docket No. A115453 (hereafter, A115453).

Shortly after filing the motion before Judge Mallach, Brandstetter moved for summary judgment in the Third Action. Brandstetter's motion claimed she was entitled to summary judgment on all of Lembi and Kockos's claims in the Third Action, but the motion distinguished between the suit's first cause of action for relief from forfeiture of the lease and the remaining tort causes of action. As to the first cause of action, Brandstetter argued that by settling the Second Action and surrendering possession of the premises, Lembi and Kockos were judicially and equitably estopped from seeking reinstatement of the lease. Addressing the merits of the reinstatement claim, Brandstetter

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On October 13, 2003, the prospective buyers for Kockos's Brandt Road property instructed North American Title to cancel the escrow. Kockos alleged that the sale was not consummated because Cullinane had wrongfully recorded the judgment in the First Action, asserted a lien on the escrow, and demanded payment. Kockos later entered into another contract for sale of the Brandt Road property, and that transaction closed on or about February 19, 2004.

[2] At the case management conference, Brandstetter's counsel informed the court that Brandstetter had died the previous day. It appears that Peter E. Lippett and David E. Backman were later named successor trustees and substituted as parties in her stead. For the sake of simplicity, we will refer to the substituted parties as "Brandstetter."

[3] Although the court made its oral ruling on December 13, 2005, the written order memorializing its ruling was not filed until May 16, 2006.

contended that Lembi and Kockos could not satisfy the statutory requirements for relief from forfeiture of the lease and were not entitled to equitable relief. (See Code Civ. Proc., § 1179 [permitting application for relief from forfeiture of lease if application is made prior to restoration of possession to landlord and full payment of rent is made]; Civ. Code, § 3275 [party incurring a forfeiture for failure to comply with terms of obligation may be relieved therefrom "upon making full compensation to the other party"].)

Brandstetter asserted that Lembi and Kockos's tort claims were barred because the publications upon which they were based—Cullinane's recording of the judgment in the First Action and his letters to North American—were protected by the absolute litigation privilege of Civil Code section 47, subdivision (b). She also argued that the tort causes of action were barred because they should have been asserted as compulsory cross-complaints in the Second Action. (See Code Civ. Proc., § 426.30, subd. (a).)

After a hearing, the trial court granted Brandstetter's motion for summary judgment in the Third Action. In an order dated August 31, 2006, the trial court ruled that Lembi and Kockos's first cause of action was barred by the doctrines of judicial and equitable estoppel. It further ruled that the second, third, fourth, and fifth causes of action were barred by the litigation privilege. On September 7, 2006, the trial court entered a judgment dismissing Lembi and Kockos's complaint in the Third Action.

On September 27, 2006, Lembi and Kockos filed a motion for a new trial. At the hearing on the motion, the trial court remarked, "this motion really doesn't bring anything new to my attention," and it went on to state that after reviewing the cases on which it had relied in granting Brandstetter's motion for summary judgment, it saw no reason to change its earlier ruling. The trial court then denied the motion for new trial.

Lembi and Kockos filed an appeal from both the order granting summary judgment and the order denying their motion for new trial. That appeal is docketed in this court as No. A116342 (hereafter, A116342).

The Award of Attorney Fees

On or about September 26, 2006, Brandstetter moved for an award of attorney fees in the Third Action. The motion sought fees based on an attorney fee provision in the

lease, and it included a request for fees incurred in defending against both the first cause of action for declaratory relief and the four tort causes of action. The request also included time Yanowitz had expended in connection with the motion to enforce the settlement agreement in the Second Action. The total amount sought in Brandstetter's initial motion was $64,855. A motion for additional fees was subsequently filed; the cumulative total fees Brandstetter requested were $82,050.50.

After a hearing, the superior court ruled that attorney fee provision of the lease entitled Brandstetter to recovery of fees incurred in defending against all claims asserted in the Third Action. The court further determined that the amount of fees requested was reasonable, and it therefore awarded Brandstetter the entire $82,050.50.

On April 26, 2007, Lembi and Kockos filed a notice of appeal from the order awarding attorney fees. That appeal is docketed in this court as No. A117583 (hereafter, A117583).

DISCUSSION

We will address Lembi and Kockos's challenges to the superior court's rulings in the order in which they were appealed.

I. *Judge Mallach Properly Granted Brandstetter's Motion to Enforce the Settlement Agreement*

In A115453, Lembi and Kockos contend Judge Mallach erred in ruling that the settlement agreement in the Second Action precluded them from bringing a claim in the Third Action for relief from forfeiture and for reinstatement of the lease. Appellants make two arguments. First, they contend Judge Mallach lacked subject matter jurisdiction to enter the order because Brandstetter had already dismissed the Second Action pursuant to the settlement agreement. Second, they assert Judge Mallach erred because her order effectively added new terms to the settlement agreement, terms to which Lembi and Kockos had never consented. We reject each contention.

A. *Standard of Review*

We are called upon to review an order enforcing a settlement agreement under Code of Civil Procedure section 664.6. In acting on a motion under this section, "the trial

court must determine whether the parties entered into a valid and binding settlement of all or part of the case." (*Corkland v. Boscoe* (1984) 156 Cal.App.3d 989, 994.) In making this determination, the trial court acts as a trier of fact (*Kohn v. Jaymar-Ruby, Inc.* (1994) 23 Cal.App.4th 1530, 1533 (*Kohn*)), and it has discretion to receive oral testimony or to decide the matter based upon declarations alone (*Fiore v. Alvord* (1985) 182 Cal.App.3d 561, 565-566). In addition, where, as in this case, "the same judge presides over both the settlement and the [Code of Civil Procedure] section 664.6 hearing, [she] may avail [her]self of the benefit of [her] own recollection. [Citation.]" (*Kohn, supra*, at p. 1533.)

Whether the parties have settled all or part of a case is an issue of fact, thus "we review the trial court's determination . . . for substantial evidence." (*Elnekave v. Via Dolce Homeowners Assn.* (2006) 142 Cal.App.4th 1193, 1198.) Furthermore, we must resolve all evidentiary conflicts and draw all reasonable inferences in support of the trial court's order. (See *Osumi v. Sutton* (2007) 151 Cal.App.4th 1355, 1360.) Even if the evidence upon which the trial court bases its decision is undisputed, where different inferences may reasonably be drawn from that evidence, we may not substitute our deductions for those of the trial court. (See *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 633 (*Winograd*) [applying "rule of conflicting inferences" to stipulation entered into orally before the court].) In other words, " '[w]here the inferences are conflicting, it is for the trier of fact to resolve the conflict . . . .' [Citations.]" (*Id.* at p. 634.)

Our case law uniformly treats settlement agreements as contracts (*Timney v. Lin* (2003) 106 Cal.App.4th 1121, 1127), and they are therefore judged by the same principles applicable to any other contract (*Stewart v. Preston Pipeline Inc.* (2005) 134 Cal.App.4th 1565, 1585). "Mutual assent to contract is based upon objective and outward manifestations of the parties; a party's 'subjective intent or subjective consent, therefore is irrelevant.' [Citations.]" (*Id.* at p. 1587.) The ultimate question is thus "what would the parties' objective manifestations of agreement and objective expressions of intent lead a reasonable person to believe they were agreeing to?" (*Winograd, supra,* 68 Cal.App.4th at p. 632.)

B. *Subject Matter Jurisdiction*

Appellants' contention that Brandstetter's dismissal of the Second Action deprived Judge Mallach of subject matter jurisdiction to enter the challenged order is frivolous. The second sentence of Code of Civil Procedure section 664.6 provides that "[i]f requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement." "[E]ven though a settlement may call for a case to be dismissed, or the plaintiff may dismiss the suit of its own accord, the court may nevertheless retain jurisdiction to enforce the terms of the settlement, until such time as all of its terms have been performed by the parties, *if the parties have requested this specific retention of jurisdiction*." (*Wackeen v. Malis* (2002) 97 Cal.App.4th 429, 439; accord, *Hines v. Lukes* (2008) 167 Cal.App.4th 1174, 1182.) Because such a request was made, the trial court retained jurisdiction to enforce the terms of the settlement agreement in the Second Action notwithstanding Brandstetter's dismissal of the suit. Judge Mallach did not lack subject matter jurisdiction to enter the challenged order.[4]

C. *Substantial Evidence Supports the Challenged Order*

Reduced to its essence, appellants' second argument is that in agreeing to settle the Second Action by surrendering possession of the El Camino Real property to Brandstetter and paying her a sum of money representing approximately one-half of her claim for back rent, they did not thereby agree that they would not seek "relief from forfeiture" of the lease and recovery of possession of the subject premises. Appellants claim that Judge Mallach, without their consent, added a release of their claim for relief from forfeiture to the settlement agreement.

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4 Lembi and Kockos cite *Hagan Engineering, Inc. v. Mills* (2003) 115 Cal.App.4th 1004 as support for their position, but they fail to note that in that case the party seeking enforcement of the settlement "did not make a request for the court to 'retain jurisdiction[.]' " (*Id*. at p. 1010.) The cited case stands only for the proposition that the trial court does not retain jurisdiction to enforce the settlement agreement unless the request is made to the court itself. (*Id.* at pp. 1010-1011.)

At the conclusion of the settlement negotiations before Judge Mallach, Yanowitz stated the terms of the settlement agreement for the record. Yanowitz specifically noted that the settlement would *not* affect Brandstetter's then-pending motion for recovery of attorney fees on appeal and that any award of fees made would be added to the balance of money due under the settlement. When Yanowitz had completed this recitation, Judge Mallach asked appellants' counsel, Bradley Kass (Kass), "is there anything that you would like to add to that?" Kass explained that his clients were entitled to a dismissal with prejudice but agreed to wait until Brandstetter resolved a dispute with her former lawyer. He then stated, "Other than that, it seems okay." He said nothing about any claims that appellants wished to reserve. The attorneys then proceeded to voir dire their clients, who acknowledged that they accepted the terms of the settlement agreement. Judge Mallach then asked, "Anything else that anyone needs for the record?" Again, Kass made no mention of any claims that appellants wished to reserve.

In declarations submitted in support of the motion, Yanowitz stated that Brandstetter's primary concern in the Second Action was to recover possession of the premises as soon as possible and that during the settlement negotiations, restoration of the premises to Brandstetter "was a 'given' and was not even an issue that was the subject of any negotiation." He also stated that during the settlement negotiations before Judge Mallach, Kass did not discuss with him any affirmative claims Lembi and Kockos believed they had against Brandstetter. In his own declaration, Kass claimed only to have had conversations with Yanowitz "[p]rior to the settlement" and asserted that Yanowitz was fully aware of Lembi and Kockos's affirmative claims against Brandstetter. Yanowitz denied being aware of any such claims and pointed out that Kass did not claim to have discussed such claims with Yanowitz during the two days of court supervised settlement negotiations.

At the hearing on the motion to enforce the settlement agreement, Judge Mallach recited her recollection of the settlement negotiations on this matter, stating: "Mr. Kass did indicate that he wanted to reserve some issues and we discussed that, and I didn't know whether he had any discussions with Mr. Yanowitz about that. I've had no

discussions with Mr. Yanowitz about that. And I waited to see when the matter was put on the record whether Mr. Kass was going to say anything about that, and he did not, so I did not view it as the [c]ourt's role to bring that issue up, so I said nothing. And in the [c]ourt's view, that meant that those issues -- claims were not reserved because they were not, A, mentioned to the opposing counsel and, B, put on the record in any form whatsoever." Kass argued in response that there was no need for him to reserve any claims, since appellants affirmative claims were not part of the case. He contended Brandstetter should have included a release in the settlement agreement if she wished to settle appellants' affirmative claims.

Judge Mallach's conclusion that Lembi and Kockos's claim for relief from forfeiture of the lease was encompassed by the settlement agreement in the Second Action was supported by substantial evidence. First, Judge Mallach appropriately relied on her own recollection of the settlement negotiations in reaching her decision. (*Kohn, supra,* 23 Cal.App.4th at p. 1533.) In her order she noted "that during the settlement conference, the parties did not discuss the reservation of any additional claims for relief from forfeiture or for reinstatement of the lease." Judge Mallach ruled that if Lembi and Kockos wished to reserve a claim for relief from forfeiture, they were obliged to provide notice to Brandstetter and to place such a reservation on the record. The latter ruling is supported by substantial evidence, since the trial court could infer from Yanowitz's declaration in support of the motion to enforce the settlement agreement that restoration of possession to Brandstetter was a precondition to his acceptance of any settlement. In such circumstances, Judge Mallach could properly conclude that if Kass wished to reserve a claim for relief from forfeiture of the lease, he was under a duty to speak up and place that matter on the record. (See *Skulnick v. Roberts Express, Inc.* (1992) 2 Cal.App.4th 884, 890-891 (*Skulnick*) [parties equitably estopped from asserting indemnification rights where they failed to raise such rights at settlement conference; waiver of such rights held an implied condition of settlement].) Yanowitz himself placed just such an express reservation on the record when he noted that the settlement would not affect the pending motion for attorney fees for the appeal in the First Action. To the

extent that there may be conflicts in the evidence regarding the content or scope of the settlement negotiations, those were for Judge Mallach to resolve. (*Kohn,* at p. 1533.)

Second, the context of the proceedings between Brandstetter and appellants at the time the Second Action was settled provides further support for the challenged order. In her second amended complaint in the Second Action, Brandstetter alleged that as a result of the judgment in the First Action, the lease had been terminated and Lembi and Kockos occupied the premises as tenants at sufferance.[5] She also alleged that she was entitled to immediate possession of the premises. In addition, she claimed that, independent of the judgment in the First Action, she was entitled to terminate the lease and recover possession of the premises. On May 4, 2005, as the parties were preparing the Second Action for trial, Judge Dylina ruled that the judgment in the First Action had "clearly terminated the lease agreement between [Brandstetter] and [appellants]" and concluded that the relationship between Brandstetter and appellants was a tenancy at sufferance. Thus, at the time the parties entered into settlement negotiations, the lease Lembi and Kockos had previously held on the El Camino Real property had been terminated by the judgment in the First Action, that judgment had been affirmed by this court, and Judge Dylina had ruled that Lembi and Kockos were merely tenants at sufferance.

Given this state of affairs, Judge Mallach could certainly have concluded that a reasonable person would have understood the settlement agreement as a final resolution of all issues relating to both the lease and the possession of the property. (See *Winograd, supra,* 68 Cal.App.4th at p. 632 [ultimate question is "what would the parties' objective manifestations of agreement and objective expressions of intent lead a reasonable person

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[5] "A tenancy at sufferance arises when a person goes into possession of land lawfully and occupies it afterward without any title at all. [Citations.]" (*Gartlan v. C. A. Hooper & Co.* (1918) 177 Cal. 414, 426.) A tenant at sufferance, also known as a "holdover tenant," has no contractual relationship with the landlord. (*Aviel v. Ng* (2008) 161 Cal.App.4th 809, 820.) "Unlike other tenancies . . . , there is *no consensual relationship* between a holdover tenant and landlord (no privity of contract). The tenant has only 'naked possession' (not a lawful interest in the property) . . . ." (Friedman et al., Cal. Practice Guide: Landlord-Tenant (The Rutter Group 2009) ¶ 2:23, p. 2A-11.)

to believe they were agreeing to?"].) Permitting Lembi and Kockos to seek relief from forfeiture and reinstatement of the lease would potentially allow them to recover possession of the premises. This would effectively undo the settlement in the Second Action, which Brandstetter brought in large part to recover actual possession of her property. Indeed, if the settlement were construed in the manner Lembi and Kockos suggest, it is difficult to understand what Brandstetter would have gained from it. She already had in hand a final judgment declaring the lease terminated. Judge Dylina had ruled that Lembi and Kockos were merely tenants at sufferance, which meant that they held nothing more than naked possession of the premises. Under the settlement agreement, Lembi and Kockos immediately surrendered possession to Brandstetter, and in return Brandstetter gave up about one-half of her claim for back rent. It would be unreasonable to conclude that Brandstetter agreed to give up such a substantial sum of money to settle one lawsuit and regain possession only to face another lawsuit that might deprive her of the possession to which she had just been restored.

Finally, Judge Mallach's order is supported by the legal principles applicable to settlement agreements generally. Such agreements "ordinarily conclude all matters put in issue by the pleadings—that is, questions that otherwise would have been resolved at trial. [Citation.]" (*Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 677 (*Folsom*).) Brandstetter's complaint put in issue the questions of termination of the lease and possession of the property. Because those questions were squarely put in issue by the pleadings, they were presumptively resolved by the settlement agreement ending the Second Action. (*Ibid*.) Moreover, public policy strongly encourages settlement as a means of reducing the expense and persistency of litigation. (*Skulnick, supra,* 2 Cal.App.4th at p. 891.) Permitting Lembi and Kockos to relitigate the issues of the validity of the lease and possession of the El Camino Real property would subvert that policy.

Accordingly, we affirm the trial court's order holding that the settlement agreement in the Second Action embraced Lembi and Kockos's claim for relief from

forfeiture and barred appellants from pursuing the first cause of action in their complaint in the Third Action.

II. *The Trial Court Properly Granted Summary Judgment on Lembi and Kockos's Tort Causes of Action*

In A116342, Lembi and Kockos appeal from the trial court's grant of summary judgment on all five of their claims in the Third Action. In this portion of our opinion, we consider the trial court's ruling on the second, third, fourth, and fifth causes of action.[6] The causes of action at issue are for abuse of process, slander of title, intentional interference with prospective economic advantage, and negligent interference with prospective economic advantage. All arise out of Cullinane's allegedly wrongful recording of the judgment in the First Action and his two communications with North American. Lembi and Kockos contend that the trial court erred in ruling that these causes of action were barred by the "litigation privilege" of Civil Code section 47, subdivision (b).

A. *Standard of Review*

"We review the trial court's grant of summary judgment de novo, applying the same statutory procedure followed in the trial court. [Citation.]" (*Taylor v. Elliott Turbomachinery Co. Inc.* (2009) 171 Cal.App.4th 564, 574.) Summary judgment is proper "if all the papers submitted show there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A party may move for summary judgment if it contends that the action has no merit. (Code Civ. Proc., § 437c, subd. (a).) One way in which a defendant may show that a cause of action has no merit is to establish the existence of an

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6 Our affirmance of Judge Mallach's order in A115453 makes it unnecessary to consider appellants' arguments regarding their first cause of action for relief from forfeiture. Having upheld Judge Mallach's determination that this claim was encompassed within the settlement agreement that concluded the Second Action, any argument regarding the propriety of granting summary judgment on the first cause of action is now moot. The settlement agreement "is decisive of the rights of the parties and serves to bar reopening of the issues settled." (*Gorman v. Holte* (1985) 164 Cal.App.3d 984, 988; see also *Folsom, supra,* 32 Cal.3d at p. 677.)

affirmative defense thereto. (Code Civ. Proc., § 437c, subd. (*o*)(2); see *Hunsucker v. Sunnyvale Hilton Inn* (1994) 23 Cal.App.4th 1498, 1501-1502, 1505 [summary judgment properly granted where defendant established that its conduct was privileged under Civ. Code, § 47, subd. (b)].) If a defendant establishes that there is a complete defense to the plaintiff's causes of action, the defendant has met the initial burden of showing that those causes of action have no merit, and "the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(2); *Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480, 1484.) We must then determine whether the party opposing the motion has disclosed the existence of triable issues of material fact that would preclude summary judgment. (See *Bennett v. McCall* (1993) 19 Cal.App.4th 122, 126.)

B. *The Litigation Privilege—General Principles*

"The litigation privilege, codified at Civil Code section 47, subdivision (b), provides that a 'publication or broadcast' made as part of a 'judicial proceeding' is privileged." (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1241 (*Action Apartment*).) "The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. [Citations.]" (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212 (*Silberg*).) When the privilege applies, it is "absolute in nature," meaning that it protects " '*all* publications, irrespective of their maliciousness.' " (*Action Apartment, supra,* at p. 1241, quoting *Silberg, supra,* 50 Cal.3d at p. 216.) Thus, publications falling within the privilege may not serve as the basis for tort claims such as abuse of process (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1058, 1063-1065 (*Rusheen*)), slander of title (*Albertson v. Raboff* (1956) 46 Cal.2d 375, 379-381 (*Albertson*)), or intentional interference with prospective economic advantage (*Asia Investment Co. v. Borowski* (1982) 133 Cal.App.3d 832, 841-842). With these principles in mind, we examine appellants' contentions.

C. *Appellants Do Not Identify any Disputed Issues of Material Fact*

We note at the outset that Lembi and Kockos make no claim in their opening brief that there are disputed issues of fact precluding summary judgment on their tort causes of action. Although their reply brief asserts that there are disputed issues of fact concerning whether Cullinane's actions were related to litigation, the reply brief does not identify any specific disputed issue of fact the trial court allegedly overlooked, nor does it point to any evidence in the record demonstrating the existence of such a factual dispute. Instead, appellants seem to argue that whether a communication is related to litigation—the fourth element of the litigation privilege—is a disputed factual issue as a matter of law. But where the facts are undisputed, the applicability of the litigation privilege may be decided as a matter of law on summary judgment. (*Obos v. Scripps Psychological Associates, Inc.* (1997) 59 Cal.App.4th 103, 107-108, fn. 3 (*Obos*).) In fact, numerous cases have determined this issue by looking at the pleadings alone. (See, e.g., *Rubin v. Green* (1993) 4 Cal.4th 1187, 1193-1196, 1204 [attorneys' prelawsuit communication with residents of mobile home park, allegedly soliciting litigation with park owners, held protected by litigation privilege; trial court's decision to sustain demurrer without leave to amend affirmed]; *Brown v. Kennard* (2001) 94 Cal.App.4th 40, 48-51 (*Brown*) [in abuse of process action, trial court properly sustained demurrer without leave to amend on basis of litigation privilege where defendant allegedly wrongfully levied on legally exempt assets of nonparty to an invalid judgment].)

Lembi and Kockos cite only an isolated statement from *Action Apartment, supra,* 41 Cal.4th 1232, as support for their argument. In *Action Apartment,* the California Supreme Court remarked that "[w]hether a prelitigation communication relates to litigation that is contemplated in good faith and under serious consideration is an issue of fact." (*Id.* at p. 1251.) As our colleagues in Division Two have explained, however, the focus of the inquiry is on whether the party making the prelitigation communication is, in fact, seriously and in good faith *considering litigation.* (See *Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1487 (*Feldman*).) Here, Brandstetter asserted that Cullinane's recording of the judgment in the First Action and his letters to North

American were designed to collect the attorney fee award in the First Action and the back rent, which was the subject of the Second Action. The complaint in the Second Action, which sought recovery of the back rent, was filed on February 5, 2004, some four months after Cullinane's recording of the judgment and his letters to the title company. In opposing summary judgment, Lembi and Kockos did not dispute that this was Cullinane's purpose, but only claimed that his actions did not constitute "communications." In this court, appellants assert that Cullinane's conduct was not communicative. They do not claim that Cullinane's recording of the judgment and his communications to North American were unrelated to collecting the judgment in the First Action or to litigation that was contemplated in good faith and under serious consideration. And as to the latter issue, Brandstetter's "prompt filing of the [Second Action] would belie any such assertion." (*Id.* at p. 1488.)

Because there are no disputed issues of material fact, we may determine as a matter of law whether the litigation privilege operates to bar the tort claims appellants seek to bring in the Third Action. (*Obos, supra*, 59 Cal.App.4th at pp. 107-108, fn. 3.)

D. *The Litigation Privilege Applies Even to Malicious Postjudgment Communications That Do Not Invoke the Functions of the Court or Its Officers*

A number of the legal arguments in appellants' opening brief are foreclosed by California Supreme Court decisions that appellants either fail to distinguish or, in some cases, even cite. First, appellants contend it was error for the trial court to extend the litigation privilege to actions that occurred after the entry of final judgment in the First Action. Contrary to this claim, it is well established that the litigation privilege "is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, *or afterwards*. [Citation.]" (*Rusheen, supra,* 37 Cal.4th at p. 1057, italics added.) Second, Lembi and Kockos assert that Cullinane's actions cannot be protected by the litigation privilege because "Cullinane and Brandstetter **did not** involve the court for their malicious scheme to harm [a]ppellants." (Underscoring and boldface type in original.) But it has been clear at least since Justice Traynor's opinion in *Albertson, supra,* 46 Cal.2d 375, that the privilege applies "even though the publication is

made outside the courtroom *and no function of the court or its officers is invoked.*" (*Id.* at p. 381, italics added.) Third, Lembi and Kockos contend that Cullinane's actions do not fall within the litigation privilege because they were "willful," "malicious," "mislead[ing]," and "tort[i]ous." As noted earlier, however, our state's Supreme Court held almost two decades ago that the litigation privilege applies "to *all* publications, irrespective of their maliciousness." (*Silberg, supra,* 50 Cal.3d at p. 216.) Thus, the privilege applies even though the communication may be otherwise tortious in character. (*Id*. at p. 218.) Indeed, as the Supreme Court noted in *Rusheen, supra,* 37 Cal.4th at page 1058, the privilege has even been applied "in the context of abuse of process claims alleging the filing of false or perjurious testimony or declarations."[7]

E. *None of Appellants' Legal Arguments Is Meritorious*

Appellants claim the litigation privilege does not apply to Cullinane's actions for three reasons. First, they argue the privilege does not apply because the amounts Cullinane claimed were due to Brandstetter were in excess of what had actually been awarded by the judgment in the First Action. Second, they assert that the litigation privilege does not apply because, at the time Cullinane recorded the judgment and communicated with the title company, the judgment in the First Action was stayed by Lembi and Kockos's appeal to this court. Third, they contend that Cullinane's actions

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[7] We also reject appellants' argument that Cullinane and SC Properties cannot assert the litigation privilege because they were not parties to the underlying litigation. Appellants first raised this argument in their reply brief, and it would violate basic notions of fairness to Brandstetter if we were to consider it. (See *In re Groundwater Cases* (2007) 154 Cal.App.4th 659, 693.) In addition, Lembi and Kockos did not present this argument to the trial court in opposing Brandstetter's motion for summary judgment. It is therefore " 'doubly waived.' " (*Children's Hospital & Medical Center v. Bontá* (2002) 97 Cal.App.4th 740, 776 (*Children's Hospital*).) Even if the argument were properly before us, it would nevertheless be unpersuasive, as the litigation privilege also protects communications by those who act as agents for parties. (See *Feldman, supra,* 160 Cal.App.4th at p. 1491 [litigation privilege applied to alleged threats made to tenants by landlord's authorized agent, even though agent was not party to eviction action].) Lembi and Kockos acknowledged below that Cullinane acted "on behalf of himself and Brandstetter," and there is no dispute that Cullinane was Brandstetter's agent.

were not intended to achieve the objects of the litigation. None of these arguments is meritorious.

First, a demand for amounts in excess of those awarded in the First Action does not preclude application of the litigation privilege. In *Brown*, Brown sued Kennard for abuse of process because Kennard allegedly caused a writ of execution to be levied upon Brown's " 'categorically exempt funds,' i.e., Social Security retirement benefits and personal retirement benefits." (*Brown, supra*, 94 Cal.App.4th at p. 43, fn. omitted.) In addition, Brown alleged that Kennard refused to release the levy after being notified of the exempt status of the funds. (*Ibid.*) Brown further alleged that the judgment Kennard sought to enforce was not final. (*Ibid.*) Moreover, Brown's complaint claimed that the purported judgment had been entered in an action to which Brown was not even a party. (*Id.* at pp. 43, 44.) Nevertheless, the Court of Appeal held that the trial court had properly sustained Kennard's demurrer without leave to amend because Kennard's conduct was protected by the litigation privilege. (*Id.* at pp. 43, 46-51.) If the litigation privilege shields the conduct at issue in *Brown*, then it protects one who merely seeks to collect an amount greater than that awarded in a judgment. (Cf. *Profile Structures, Inc. v. Long Beach Bldg. Material Co.* (1986) 181 Cal.App.3d 437, 440, 444 (*Profile*) [litigation privilege applied to service on third parties of temporary protective order under Code Civ. Proc., § 486.010 et. seq., even though amount of plaintiff's money withheld exceeded amount covered by protective order].)

Appellants' second argument fares no better. That the judgment in the First Action was stayed pending appeal does not render the litigation privilege inapplicable. The courts in both *Brown, supra*, 94 Cal.App.4th 40 and *O'Keefe v. Kompa* (2000) 84 Cal.App.4th 130 (*O'Keefe*), held that the litigation privilege applied to postjudgment enforcement activities although the judgments sought to be enforced were not yet final. (*Brown*, at pp. 43-44, 48; *O'Keefe,* at pp. 132-133 [judgment stayed by pending appeal].) Similarly, in *Boston v. Nelson* (1991) 227 Cal.App.3d 1502, the court held that the litigation privilege protected a law firm's actions in causing a nonfinal Hawaii judgment

to be entered in California, even though the plaintiff alleged that the law firm had misled the California court regarding the finality of the Hawaii judgment. (*Id*. at p. 1507.)

Finally, we reject Lembi and Kockos's claim that Cullinane's actions were not privileged because they were not intended to achieve the objects of the litigation. "The requirement that the communication be in furtherance of the objects of the litigation is, in essence, simply part of the requirement that the communication be connected with, or have some logical relation to, the action, i.e., that it not be extraneous to the action." (*Silberg, supra,* 50 Cal.3d at pp. 219-220.) Clearly, the recording of the judgment in the First Action was part of Cullinane's effort to secure payment of the attorney fees awarded in that action. (*O'Keefe, supra,* 84 Cal.App.4th at p. 134.) As such, the recording of the judgment is properly viewed as "an extension of that judicial process." (*Ibid*.)

Cullinane's communications with North American were also privileged, because they informed a third party in possession of Kockos's assets of the existence of a judgment against him. *Profile, supra,* 181 Cal.App.3d 437, illustrates this point. In that case, the defendant (LBBMC) obtained a temporary protective order under Code of Civil Procedure section 486.010 et seq. in lieu of an ex-parte right-to-attach order. (*Profile,* at p. 440.) The amount of the protective order was $54,704.32. (*Ibid*.) LBBMC served the temporary protective order on a bank holding funds belonging to the plaintiff (Profile) and on a university with which Profile had a contract. (*Ibid*.) On the basis of the protective order, the bank and the university withheld from Profile assets totaling $78,155.32. (*Ibid*.) Profile sued LBBMC for abuse of process, alleging that "LBBMC knew, or should have known, that service of the temporary protective order on the bank and the university had no legal effect; such entities were served solely to make them believe that they had a duty to withhold funds of Profile in their hands. LBBMC's ulterior motive in so misusing the temporary protective order was to coerce Profile into paying LBBMC the full amount of the damages sought in its complaint although LBBMC knew that Profile was liable for less than that amount." (*Id*. at pp. 440-441.)

The court rejected Profile's arguments that service of the protective order had no logical relation to the action and was not made to achieve the objects of the litigation.

(*Profile, supra,* 181 Cal.App.3d at pp. 442-443.) It concluded that Profile took too narrow a view of the conditions necessary for application of the privilege. (*Id.* at p. 442.) The court explained: "The bank and the university held property of [Profile] described in the order; [LBBMC's] act of furnishing copies of the order to those entities served the purpose of informing them of the prohibition against [Profile's] transfer of its property in their hands. Accordingly, it cannot be said that publication of the order to the bank and the university had no logical relation to the action and was not made to achieve the object of preserving [Profile's] property subject to the order." (*Id*. at p. 443.) Similarly, in this case, Cullinane's communications with the title company informed it of the existence of the judgment in the First Action and were made to achieve Brandstetter's objectives in both the First Action (collection of the attorney fee award) and the Second Action (recovery of back rent). Cullinane's actions therefore had "some logical relation to" the action and were not "extraneous" to it. (*Silberg, supra,* 50 Cal.3d at p. 220.)

For the foregoing reasons, we hold that the litigation privilege barred the tort claims asserted in Lembi and Kockos's second through fifth causes of action. The superior court therefore properly granted summary judgment to Brandstetter on those claims.[8]

III. *The Trial Court's Award of Attorney Fees Was Proper*

The lease under which Lembi and Kockos occupied Brandstetter's property contained a provision for recovery of attorney fees in the event of suits arising out of the lease. Section 22.8 of the lease provided in relevant part: "Costs of Suit: If Tenant or Landlord shall bring any action for any relief against the other, declaratory or otherwise, arising out of this Lease, including any suit by Landlord for the recovery of rent or possession of the Premises, the losing party shall pay the successful party a reasonable sum as and for attorneys' fees, costs and expenses, which shall be deemed to have accrued on the commencement of such action." After the trial court entered summary

[8] Our conclusion that summary judgment was properly granted necessarily disposes of Lembi and Kockos's argument that the superior court erred in denying their motion for new trial.

judgment against Lembi and Kockos in the Third Action, Brandstetter moved for an award of attorney fees based on this provision and later made a second motion for additional attorney fees. Brandstetter's first motion sought recovery of the attorney fees incurred in defending both against Lembi and Kockos's first cause of action for relief from forfeiture and against the tort claims in the second through fifth causes of action. The second motion sought fees for services rendered in opposing Lembi and Kockos's motion for new trial and in preparing the reply in support of the original motion for fees.

After a hearing, the trial court found that the attorney fee provision of the lease was broad enough to authorize an award of attorney fees on all of Lembi and Kockos's causes of action. It ruled that "but for the lease, the underlying actions ultimately terminating the lease [in the First Action] and seeking unpaid rents [in the Second Action] and this [Third Action] seeking declaratory relief from forfeiture of the lease and tort damages against [Brandstetter] based upon the alleged misuse of the judgment entered in [the First Action] clearly would not have arisen. [Citation.]" Finding the amount of fees Brandstetter had requested reasonable, the trial court ordered Lembi and Kockos to pay Brandstetter $82,050.50 in attorney fees.

In A117583, Lembi and Kockos challenge the attorney fee award on a number of grounds. First, they contend that their cause of action for relief from forfeiture did not arise out of the lease because (a) the lease had already been terminated and (b) their cause of action for relief from forfeiture was statutory, not contractual, in nature. Second, regarding their tort claims, appellants argue that these claims did not arise out of the lease, and therefore any fee award for defending against these claims was improper. Third, Lembi and Kockos contend fees should not have been awarded because none were requested in either the complaint or the answer. Fourth, appellants assert that it was improper for the trial court to award fees that Brandstetter incurred in bringing the motion to enforce the settlement. Fifth, appellants challenge the amount of the fees awarded for various tasks. Finally, Lembi and Kockos claim the trial court should not have awarded

fees for hours expended in the defense of Cullinane and SC Properties, since they were not parties to the lease under which fees were awarded.[9]

A. *Standard of Review*

Lembi and Kockos challenge both the legal basis for the trial court's award of fees to Brandstetter and the amount of the fees awarded. The determination of the legal basis for an award of attorney fees is a question of law that this court reviews de novo. (*City and County of San Francisco v. Ballard* (2006) 136 Cal.App.4th 381, 399.) Where, as here, the relevant facts are not in dispute, we examine the applicable statutes and provisions of the lease to determine whether Brandstetter is entitled to fees. (*Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 705 (*Exxess Electronixx*).)

"With respect to the *amount* of fees awarded, there is no question our review must be highly deferential to the views of the trial court. [Citation.]" (*Children's Hospital, supra,* 97 Cal.App.4th at p. 777.) Trial courts possess "broad authority" to determine what constitutes a reasonable fee award. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095 (*PLCM Group*).) "The 'experienced trial judge is the best judge of

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9 Lembi and Kockos also claim the lease was not properly before the court because it was not attached to Brandstetter's initial motion for an award of fees. This argument is meritless. In moving for an award of attorney fees, Yanowitz submitted a declaration quoting the lease's attorney fee provision. Lembi and Kockos objected to the quotation of the provision in Brandstetter's memorandum of points and authorities, but their objection made no reference to Yanowitz's declaration. As the trial court noted at the hearing, the declaration contained the language of the attorney fee provision, and appellants' counsel failed to object to the declaration. That failure permitted the trial court to treat the objection as waived and to consider the contents of the declaration. (See *Broden v. Marin Humane Society* (1999) 70 Cal.App.4th 1212, 1226-1227, fn. 13.) Moreover, Brandstetter's motion complied with the terms of Code of Civil Procedure section 1005, subdivision (b), which requires generally that "all moving and supporting papers shall be served and filed at least 16 court days before the hearing." Here, Brandstetter filed a request for judicial notice of the lease on or about December 13, 2006. The hearing on the motion for an award of attorney fees was held *two months later,* on February 13, 2007. Lembi and Kockos were able to file an opposition and appear at the hearing, and they do not claim that they suffered any prejudice. It follows that the trial court committed no error in considering the lease. (See *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 828-829.)

the value of professional services rendered in [her] court, and while [her] judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.' [Citations.]" (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49.) Because the trial judge is better situated than the appellate court to assess the value of counsel's services, we will not set aside the amount awarded by the trial judge "absent a showing that it is manifestly excessive in the circumstances." (*Children's Hospital*, at p. 782.)

B. *Agreements for the Award of Attorney Fees and Civil Code Section 1717*

A prevailing party is generally entitled to recover its costs in any action or proceeding. (Code Civ. Proc., § 1032, subd. (b).) Recoverable costs ordinarily do not include attorney fees, however, unless such fees are specifically authorized by statute or agreement. (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 127; see also Code Civ. Proc., § 1021.) Recoverable litigation costs will therefore include attorney fees "only when the party entitled to costs has a legal basis, independent of the cost statutes and grounded in an agreement, statute, or other law, upon which to claim recovery of attorney fees." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 606 (*Santisas*), citing Code Civ. Proc., § 1033.5, subd. (a)(10).)

Under Code of Civil Procedure section 1021, parties have the right to enter into agreements for the award of attorney fees in litigation. (*Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1342 (*Xuereb*).) In actions sounding in contract, Civil Code section 1717 (hereafter, section 1717) ensures mutuality of remedy for attorney fee claims under such agreements. (*Santisas, supra,* 17 Cal.4th at p. 610.) Section 1717, subdivision (a), provides in part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." To ensure mutuality of remedy, "the statute generally must apply in favor of the party prevailing on a contract claim whenever that party would have

been liable under the contract for attorney fees had the other party prevailed." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 870-871.) Therefore, Brandstetter's entitlement to attorney fees on a cause of action sounding in contract depends upon whether Lembi and Kockos would have been entitled to fees had they prevailed in their action against Brandstetter. (*Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 680.) That is, we examine what would have happened had appellants been afforded the relief sought in their complaint. (See *Milman v. Shukhat* (1994) 22 Cal.App.4th 538, 545 (*Milman*).)

In addition, the attorney fee provision of a contract may be broad enough to support an award of fees to the prevailing party in an action alleging both contract and tort claims. (*Santisas, supra,* 17 Cal.4th at p. 608; *Cruz v. Ayromloo* (2007) 155 Cal.App.4th 1270, 1276-1277.) "[P]arties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether such litigation sounds in tort or in contract. [Citations.]" (*Xuereb, supra,* 3 Cal.App.4th at p. 1341.) By its terms, section 1717 applies only to contract claims (§ 1717, subd. (a)), and therefore in cases involving tort claims in which a fee award is sought pursuant to a contractual provision for attorney fees, the question is whether the language of the attorney fee provision at issue permits an award under the circumstances presented. (*Xuereb, supra,* 3 Cal.App.4th at p. 1342, citing Code Civ. Proc., § 1021.)

C. *Appellants' Cause of Action for Relief from Forfeiture Involved the Lease, and Termination of the Lease Did Not Affect Brandstetter's Right to Attorney Fees*

A party's entitlement to attorney fees under section 1717 turns upon the pleadings, not the evidence. (*Manier v. Anaheim Business Center Co.* (1984) 161 Cal.App.3d 503, 508; *Jones v. Drain* (1983) 149 Cal.App.3d 484, 487; see also *Dell Merk, Inc. v. Franzia* (2005) 132 Cal.App.4th 443, 451 (*Dell Merk*).) Thus, we determine whether Brandstetter was entitled to an award of attorney fees by examining the pleadings and asking whether Lembi and Kockos would have been entitled to fees had they prevailed on their first cause of action against Brandstetter. (See *Milman, supra,* 22 Cal.App.4th at p. 545.)

In their first cause of action, Lembi and Kockos "request[ed] a relief from the forfeiture of the lease dated February 26, 1998 and [to] have the lease fully reinstated and remain in full force and effect." Thus, had appellants prevailed on that cause of action, the lease, along with its attorney fee provision, would have been reinstated. "In that situation, the [lease] would be valid, and [appellants] could recover attorney fees under [the lease]." (*Milman, supra,* 22 Cal.App.4th at p. 545; accord, *North Associates v. Bell* (1986) 184 Cal.App.3d 860, 865 (*North Associates*).) If appellants would have been entitled to an award of attorney fees had they prevailed, it necessarily follows that Brandstetter is entitled to recover attorney fees because she prevailed. (*North Associates*, at p. 865, citing § 1717.)

Appellants' arguments to the contrary are unavailing. We reject the contention that because their first cause of action was one for declaratory relief founded on a statute—in this case, Civil Code section 3275—a fee award was improper. The strictly statutory nature of a proceeding or a remedy does not preclude the action from being one based on a contract. (*Mitchell Land & Improvement Co. v. Ristorante Ferrantelli, Inc.* (2007) 158 Cal.App.4th 479, 488-489; see also *Beeman v. Burling* (1990) 216 Cal.App.3d 1586, 1608 [action held to involve lease although it also implicated local rent ordinance].) And there can be no doubt that an action for declaratory relief to determine rights under a lease is an action " 'on the contract.' " (*City and County of San Francisco v. Union Pacific R.R. Co.* (1996) 50 Cal.App.4th 987, 1000; see also *Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 346-348; *Milman, supra,* 22 Cal.App.4th at p. 545.) Indeed, the attorney fee clause at issue here applies specifically to "any action for any relief . . . , *declaratory or otherwise,* arising out of this Lease . . . ." (Italics added.)

Nor does the termination of the lease in the First Action affect Brandstetter's entitlement to attorney fees. In *Care Constr., Inc. v. Century Convalescent Centers, Inc.* (1976) 54 Cal.App.3d 701, the plaintiff (Care) sued Century alleging that Century had breached its lease with Care. (*Id.* at p. 703.) The lease provided that the lessee would pay the lessor's reasonable attorney fees in the event of any litigation. (*Id.* at p. 704.)

After trial, the court concluded that there was no binding lease between the parties. (*Id.* at p. 703.) Century then requested an award of attorney fees on appeal, and Care contended that since the trial court had found that there was no valid lease, then no attorney fees could be awarded to Century. (*Id.* at p. 705.) The court rejected this contention, holding that "where there is an action on a purported lease which contains a provision for attorney's fees for the lessor[,] the lessee is entitled to attorney's fees under . . . section 1717, if he succeeds in defending on the theory that there was no valid or enforceable lease." (*Id*. at p. 707; see *North Associates, supra,* 184 Cal.App.3d at pp. 865-866)

The attorney fee provision in the lease before us grants attorney fees to the party prevailing in litigation "arising out of this Lease." In this case, had appellants prevailed on their first cause of action, the lease would have been reinstated, and they would have been entitled to an award of attorney fees.[10] (See *North Associates, supra,* 184 Cal.App.3d at p. 865 [trial court determined that original lease had expired, but if party had succeeded on defense that he had been granted annual extensions on lease, he would have been entitled to attorney fees under lease's attorney fee provision].) In such circumstances, the reciprocity rule of section 1717 dictates that Brandstetter, the prevailing party, is likewise entitled to attorney fees.

D. *The Trial Court Properly Awarded Fees to Brandstetter for the Defense of Appellants' Tort Causes of Action*

Lembi and Kockos next attack the trial court's award of the attorney fees Brandstetter incurred in defending against their tort causes of action. They argue their tort claims did not arise out of the lease, and thus the trial court erred in awarding attorney fees relating to those causes of action. We disagree.

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10 This also disposes of appellants' argument that the trial court erred in awarding fees because the lease was forfeited during the appeal of the First Action. As explained above, the dispositive issue is whether Lembi and Kockos would have been entitled to attorney fees had they prevailed on their claims. The cases discussed in the text make clear that the forfeiture of the lease did not affect the question of entitlement to attorney fees.

"If a contractual attorney fee provision is phrased broadly enough, . . . it may support an award of attorney fees to the prevailing party in an action alleging both contract and tort claims . . . ." (*Santisas, supra,* 17 Cal.4th at p. 608.) In this case, the attorney fee provision is broad enough to encompass both tort and contract claims. Section 22.8 of the lease provides for recovery of reasonable attorney fees, costs, and expenses in "any action for any relief against the other, declaratory or otherwise, arising out of this Lease." Numerous courts have held that such language encompasses tort claims.[11] (*Santisas, supra,* at pp. 603, 608 [" 'legal action . . . arising out of the execution of this agreement' "]; *Drybread v. Chipain Chiropractic Corp.* (2007) 151 Cal.App.4th 1063, 1071-1072 [" 'any action or other proceeding arising out of this Sublease . . . concerning the subleased premises' "]; *Lerner v. Ward* (1993) 13 Cal.App.4th 155, 158-159 [" 'any action or proceeding arising out of this agreement' "]; *Xuereb, supra,* 3 Cal.App.4th at pp. 1340, 1344 [" 'If this Agreement gives rise to a lawsuit or other legal proceeding . . .' "].) Further, there can be no dispute that Brandstetter was the "successful party" for purposes of the attorney fee provision.

As our colleagues in Division Three noted in *Xuereb, supra,* 3 Cal.App.4th at page 1343, the sole question is therefore whether the Third Action arose from the lease. We conclude that it did. Like the *Xuereb* court, we construe the phrase "arising out of this Lease" in a "far more general, transactional sense than is suggested by phrases such as 'derives from' or 'proximately caused by.' " (*Id.* at p. 1344.) That is, this language is to be construed "expansively, to encompass acts and omissions occurring in connection

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11 The cases appellants cite in support of their argument are inapposite, because they involve more narrowly drafted attorney fee provisions than the one at issue here. (See *Gil v. Mansano* (2004) 121 Cal.App.4th 739, 742, 743-745 [provision for award of attorney fees "[i]n the event action is brought to enforce the terms of this [Release]" inapplicable where release was raised as *defense* to fraud cause of action; raising of defense not equivalent to bringing action to enforce release]; *Exxess Electronixx, supra,* 64 Cal.App.4th at pp. 702, 709-713 [lease authorizing attorney fee award " '[i]f any Party or Broker brings an action or proceeding to enforce the terms hereof or declare rights hereunder" did not apply to claims for fraud and breach of fiduciary duty because they were not brought to enforce the terms of lease].)

with the [lease] and the entire transaction of which it was the written memorandum." (*Ibid.*) But for the lease between the parties and Brandstetter's efforts to collect the judgment based on the lease, appellants' claims would not have arisen. (See *id.* at pp. 1343-1344.) As a consequence, Lembi and Kockos's tort claims cannot be said to be " 'quite independent of the basic contractual arrangement'; they arose from the underlying transactional relationship between the parties . . . ." (*Id.* at p. 1344.) The trial court therefore did not err in awarding to Brandstetter the attorney fees incurred in the defense of the second through fifth causes of action in Lembi and Kockos's complaint.

E. *Attorney Fees May Be Awarded Even if a Party Makes No Claim for Attorney Fees in the Complaint*

Lembi and Kockos maintain that attorney fees should not have been awarded because neither Brandstetter nor appellants included a request for fees in their pleadings. The law is to the contrary. Attorney fees may be awarded as costs pursuant to a noticed motion whether or not a party's pleading includes a specific prayer for attorney fees. (*Allstate Ins. Co. v. Loo* (1996) 46 Cal.App.4th 1794, 1797-1798; see also *Dell Merk, supra,* 132 Cal.App.4th at pp. 454-455.) In this case, Brandstetter prayed for costs in her answer and sought a fee award pursuant to a noticed motion. No more is required.

F. *The Trial Court Did Not Err in Awarding Attorney Fees Incurred in Connection with the Motion to Enforce the Settlement of the Second Action and the Motion for Attorney Fees*

Lembi and Kockos claim the trial court erred in awarding, as attorney fees in the Third Action, the fees Brandstetter incurred in filing the motion to enforce the settlement in the Second Action. They also assert that it was improper to award the attorney fees incurred in preparing Brandstetter's motion for attorney fees. Neither of these arguments withstands scrutiny.

First, we disagree with appellants that the fees awarded for the filing of the motion to enforce the settlement in the Second Action were "from a different case." Brandstetter was compelled to file the motion by Judge Buchwald's order *in the Third Action*. That order was unequivocal and stated, "[Brandstetter] *shall file* a motion before the Honorable Barbara J. Mallach to determine whether any portion of *this action* was within

the scope of the settlement agreement in the prior action between the parties and to enforce the settlement." (Italics added.) Of course, the motion to enforce the settlement agreement was necessarily filed in the Second Action, but the motion's relevance to the Third Action is obvious. At the case management conference on December 13, 2005, Judge Buchwald expressed his opinion that some or all of the claims in the Third Action might violate the settlement agreement. The clear purpose of seeking a ruling from Judge Mallach was to determine whether some or all of the claims in the Third Action could be eliminated. In these circumstances, it is disingenuous to contend that Brandstetter was seeking fees from a different case. Moreover, appellants cite no authority that would prohibit the trial court from awarding fees in such an instance, and California case law recognizes that a trial court has discretion "to award a fee that compensates work performed in a collateral action that . . . was . . . closely related to the action in which fees are sought and useful to its resolution." (*Children's Hospital, supra,* 97 Cal.App.4th at pp. 779-780.) Here, the trial court did not abuse that discretion in awarding fees incurred for the motion to enforce the settlement in the Second Action.

Next, appellants challenge the award of fees incurred for the preparation and filing of Brandstetter's motion for attorney fees. They contend Brandstetter "cited no applicable authority for the pr[o]position that they may recover fees for making an attorney fees motion." And they correctly note that Brandstetter relied on cases involving fee awards made pursuant to statute. (See *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1128, 1130-1131 [fees sought under Code Civ. Proc., § 425.16, subd. (c)]; *Serrano v. Unruh* (1982) 32 Cal.3d 621, 626 (*Serrano*) [fees sought under Code Civ. Proc., § 1021.5].)

What appellants ignore, however, is that Brandstetter requested attorney fees pursuant to a contract providing for an award of fees to the "successful party" in "any action for any relief . . . arising out of this Lease." Such a contractual provision may permit a party to recover the fees incurred in seeking the fee award itself. (See *Bruckman v. Parliament Escrow Corp.* (1987) 190 Cal.App.3d 1051, 1061-1062 [attorney fee provision of escrow instructions permitted recovery of fees incurred in preparing

application for fees].) In making their argument, appellants do not address the language of the attorney fee provision at all. They do not explain why the attorney fee motion should not be considered part of the "action" in which Brandstetter prevailed. As our state's high court explained in *Serrano,* a fee motion is not a new action but rather a collateral matter ancillary to the main cause.[12] (*Serrano, supra,* 32 Cal.3d at pp. 636-637.) Furthermore, in rejecting the argument that fees could not be recovered for defending a fee award on appeal because the appeal was not an "action" under Code of Civil Procedure section 1021.5, the court observed that "it is established that fees, if recoverable at all—pursuant either to statute *or parties' agreement*—are available for services at trial and on appeal. [Citations.] This rule governs whether or not *the sole issue on appeal has been fee entitlement*." (*Id*. at p. 637, italics added.) Similarly, in this case, there is no reason to treat Brandstetter's motions for attorney fees as somehow separate from the "action" in which she prevailed merely because the motions concerned only fee entitlement. (See *ibid*.) The trial court did not err in awarding "compensation for all hours reasonably spent . . . to establish and defend the fee claim." (*Id*. at p. 639, fn. omitted.)

G. *The Fees Awarded Are Reasonable*

Lembi and Kockos object to numerous individual items in Brandstetter's fee motion, claiming that they are unconscionable or excessive, but appellants have failed to

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[12] While *Serrano* involved a fee request brought under Code of Civil Procedure section 1021.5 (*Serrano, supra,* 32 Cal.3d at pp. 623-624 & fn. 1), we note that the language of that statute is similar to that of the attorney fee provision under which Brandstetter was awarded fees. Code of Civil Procedure section 1021.5 provides in pertinent part: "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest . . . ." Such a fee shifting statute "simply requires the plaintiff, as the party whose . . . suit caused the defendant to incur attorney fees and other costs, to bear those fees and costs. [Citation.]" (*Bernardo v. Planned Parenthood Federation of America* (2004) 115 Cal.App.4th 322, 361.) As Brandstetter points out, a contract that allocates responsibility for attorney fees accomplishes the same purpose. Because of these similarities, we find *Serrano* instructive on the issue now before us.

demonstrate an abuse of discretion by the trial court. (See *Jones v. Union Bank of California* (2005) 127 Cal.App.4th 542, 549-550 [abuse of discretion shown when award "shocks the conscience or is not supported by the evidence"].)

1. *General Principles Governing Proof of Attorney Fee Claims*

The starting point for the fee setting inquiry is a determination of the "lodestar" amount, which is the number of hours reasonably expended multiplied by the reasonable hourly rate. (*PLCM Group, supra*, 22 Cal.4th at p. 1095.) Ordinarily, the lodestar amount is established based upon the evidence presented by the fee applicant, and such evidence is certainly sufficient if it consists of declarations from counsel and billing records setting forth the hourly rates charged, the hours expended, and the services performed. (*Id*. at p. 1096; *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 63-64.) Such records "are entitled to credence in the absence of a clear indication the records are erroneous." (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 396.)

Once such a documented fee claim is presented, the burden shifts to the opposing party to present specific objections to either the hours claimed or the rates charged by counsel. (Pearl, Cal. Attorney Fee Awards (Cont.Ed.Bar 2d ed. 2008) §§ 12.14A, 12.34, pp. 336-337, 368.4.) The objections must be supported by evidence; mere assertions that the claimed fees are unreasonable or excessive will not suffice. (See *Avikian v. WTC Financial Corp.* (2002) 98 Cal.App.4th 1108, 1119 (*Avikian*); *Children's Hospital, supra,* 97 Cal.App.4th at p. 783.)

2. *Appellants' Objections to the Fee Award*

Brandstetter's motions for attorney fees were supported by declarations from Yanowitz and attorney time summaries detailing the dates of service, the tasks performed, and the hours spent on those tasks. It was therefore incumbent upon

appellants to come forth with specific objections to the time expended and the rates claimed,[13] but they failed to do so.

Many of appellants' objections to the fee award are conclusory. Such "generalized objections" are insufficient to rebut the presumption that Brandstetter's fees were reasonably and necessarily incurred. (*Hadley v. Krepel* (1985) 167 Cal.App.3d 677, 684.) For example, Lembi and Kockos assert that the fees claimed for preparation of Brandstetter's summary judgment motion are "excessive and unconscionable" because preparation of the motion consumed almost two weeks of Yanowitz's time. "But appellants' entire discussion of this issue occupies less than a page of their appellate brief, and they have provided us with no analysis of why the specific charges were unreasonable in the context of this case." (*Avikian, supra*, 98 Cal.App.4th at p. 1119.) Moreover, from our examination of the time records submitted in support of Brandstetter's fee request, it appears that the time to which appellants object included not only the preparation of the motion for summary judgment, but also preparation of a motion for summary adjudication and replies to appellants' oppositions to both motions, as well as Yanowitz's attendance at the hearing on the summary judgment motion.

Nor are Lembi and Kockos correct in their contention that Brandstetter "failed to provide significant back up and support" for the fees claimed in connection with the summary judgment motion. We take this to be an argument that Brandstetter's counsel failed to provide sufficiently detailed records to support a fee award. Lembi and Kockos cite no authority in support of this contention, and California case law is decidedly to the contrary. (See, e.g., *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 255

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[13] In this court, Lembi and Kockos do not object specifically to the hourly rate claimed by Yanowitz. To the extent that appellants may premise their claims that the fees awarded are excessive and unconscionable on Yanowitz's hourly rate, we find no abuse of discretion in the trial court's implicit finding that the rate was reasonable. Yanowitz, a Harvard educated lawyer of more than 40 years experience, declared that his standard hourly rate was $325. This hourly rate is not unreasonable for a lawyer of Yanowitz's education and experience. (See, e.g., *Russell v. Foglio* (2008) 160 Cal.App.4th 653, 661-662 [rate of $300 per hour reasonable for graduate of unaccredited law school who had become a lawyer less than three years before undertaking case].)

["California case law permits fee awards in the absence of detailed time sheets"]; *Sommers v. Erb* (1992) 2 Cal.App.4th 1644, 1651-1652 [award proper where counsel provided "no exact time sheets" and estimated number of hours spent on case]; *Martino v. Denevi* (1986) 182 Cal.App.3d 553, 559 [contemporaneous time records not necessary for fee award].) The documentation Brandstetter submitted in support of her fee claim was more than adequate.

We likewise find no merit to appellants' objections to the fees incurred in opposing the motion for new trial and in preparing replies to the oppositions to Brandstetter's motions for attorney fees. Appellants claim that Brandstetter's opposition to the new trial motion simply duplicated work done in connection with the motion for summary judgment. Their brief on appeal does not explain this contention in any detail, and Kass's declaration in opposition to the fee request presented no proof that there was any duplication of services. (See *City of Santa Paula v. Narula* (2003) 114 Cal.App.4th 485, 494 [appellants "filed no declarations in opposition to the fees and presented no proof that there was a duplication of services"].)

Appellants also object to the award of fees for work performed on behalf of Cullinane and SC Properties because Cullinane and SC Properties were not parties to the lease under which the fees were awarded. At the hearing on the fee motion, however, the trial court explained that it awarded the full amount of the fees requested because Cullinane and SC Properties were at all times acting as Brandstetter's agents. Appellants have not challenged that rationale on appeal.

Finally, appellants dispute 2.7 hours of time related to a motion to compel that they claim was never filed. They argue that Brandstetter was "essentially attempting to make double requests and this was not a reasonable attorney fees request and award." The point of this argument is difficult to discern, but after Lembi and Kockos raised the objection below, Brandstetter responded that the motion to compel was dropped because Lembi and Kockos finally provided the requested discovery after the motion was prepared. It appears that the trial court accepted Brandstetter's argument in awarding

these fees, and on appeal appellants do not contradict Brandstetter's explanation. We find no abuse of discretion.

DISPOSITION

The judgment in A116342 is affirmed. The orders in A115453 and A117583 are affirmed. Respondents shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.